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May 11, 1998

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

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MAY 11 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Docket No. 93-144  
Daniel R. Goodman, Receiver  
Request for Extension of Time

Dear Ms. Salas:

Enclosed, on behalf of Daniel R. Goodman, Receiver ("Receiver"), are an original and nine copies of a request for extension of time in the above-referenced rule making proceeding. The Receiver requests that the agency extend the time period in which certain licensees of "General Category" 800 MHz Specialized Mobile Radio ("SMR") stations may assign their authorizations without prior construction, as otherwise provided in the Second Report and Order in the above referenced proceeding.

If you have any questions concerning this matter, please call me.

Sincerely,



Russell H. Fox

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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MAY 11 1998

**In the Matter of**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

<b>Amendment of Part 90 of the Commission's</b>	)	
<b>Rules to Facilitate Future Development of</b>	)	<b>PR Docket No. 93-144</b>
<b>SMR Systems in the 800 MHz Frequency Band</b>	)	

**REQUEST FOR EXTENSION OF TIME**

**To: Chief, Wireless Telecommunications Bureau**

Daniel R. Goodman, Esq., the Court-appointed receiver (the "Receiver") for Metropolitan Communications Corp., Columbia Communications Services Corp., Nationwide Digital Data Corp., and Stephens Sinclair Ltd. (collectively, the "Receivership Companies"), by his counsel, hereby submits this Request (the "Request"), pursuant to the provisions of Section 1.41 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") that the Commission extend the period of time for certain licensees of "General Category" 800 MHz Specialized Mobile Radio ("SMR") stations to assign their authorizations without prior construction, as otherwise provided in the Second Report and Order in the above referenced proceeding.<sup>1/</sup>

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<sup>1/</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Second Report and Order, 12 FCC Rcd 19079, ¶ 42 (1997) (the "Second Report and Order").

## **I. Background**

In the Second Report and Order, the Commission, among other actions, temporarily waived the provisions of the regulations that otherwise prohibit the assignment or transfer of authorizations covering unconstructed "lower 80" and General Category 800 MHz SMR channels. Pursuant to the Second Report and Order, the assignee or transferee of the license for such an unconstructed station is required to construct the station facilities before the later of the applicable construction expiration date or as set forth in any applicable extended implementation authority. This temporary waiver is scheduled to remain in effect until six months from the end of the auction of "upper 200" 800 MHz SMR licenses. That auction ended on December 8, 1997.<sup>2/</sup> Consequently, the waiver of the ban against assignment or transfer of licenses for unconstructed stations expires on June 8, 1998.

The waiver of the ban against assignment or transfer of licenses of unconstructed stations uniquely affects those defrauded consumers who acquired their licenses through the so-called license application services of the Receivership Companies (the "Affected Licensees").<sup>3/</sup> The Affected Licensees also were to be provided relief through the adoption of a 1995 Memorandum Opinion and Order (the "MO&O")<sup>4/</sup> which granted four additional months for these Affected

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<sup>2/</sup> See Public Notice DA 97-2583, released December 9, 1997.

<sup>3/</sup> A list of the Affected Licensees was provided to the Commission in December 1994. See Letter to Rosalind K. Allen, Chief Commercial Radio Division, from Russell H. Fox, Esquire, December 9, 1994 (attaching a list of all licensees affected by Goodman matter).

<sup>4/</sup> *In the Matter of Daniel R. Goodman, Receiver; Dr. Robert Chan, Petition for Waiver of Sections 90,633(c) and 1.1102 of the Commission's Rules*, 10 FCC Rcd 8537 (1995).

Licenses to construct and load their facilities. The MO&O was to become effective when published in the *Federal Register*.

The MO&O also granted the Receiver's request that the FCC, among other things, refrain from taking enforcement actions against the Affected Licensees and otherwise ensure that the Licenses were not prejudiced during the FCC's consideration of the Receiver's waiver request which led to the grant of the MO&O. Because the FCC took such prejudicial actions during the pendency of the Receiver's waiver request, curative relief is now required. Despite repeated requests from the Receiver and counsel to the Federal Trade Commission, the FCC has not yet provided this curative relief. The MO&O issued nearly three years ago, therefore, still has not become effective and the additional time for Affected Licensees to construct and load their stations has not yet commenced.

The Affected Licensees, therefore, have not yet been able to realize the benefit of the provisions contained in the MO&O. Because the Affected Licensees will have additional time to construct and load their facilities when the MO&O becomes effective, they also cannot realize the full benefit of the waiver provisions of the Second Report and Order noted above. The Receiver is compelled, therefore, to request that the Commission extend the waiver provisions of the Second Report and Order to the Affected Licensees and their transferees for a period of at least four months after the MO&O becomes effective for each Affected License. The Commission must grant this relief in order to avoid the unintended result of the benefits of the waiver provisions of Second Report and Order not being realized by the Affected Licensees - who were the primary, if not the entire class of, intended beneficiaries of this provision.

## II. The Second Report and Order

Prior to the June 23, 1997 adoption of the Second Report and Order, the Receiver met regularly with the Commission's staff regarding the implementation of the MO&O. The Receiver sought the Commission's assistance with regard to the assignment of licenses held by the Affected Licensees to established SMR operators, some of whom had been granted extended implementation authority. The Receiver explored the possibility that, in the context of such transactions, Affected Licensees be permitted to assign or transfer their authorizations without first constructing the station facilities. This same issue was raised by commenting parties in the Docket No. 93-144 rule making proceeding.<sup>5/</sup> As a result of those comments, the Second Report and Order provides as follows:

Therefore, to facilitate relocation and geographic licensing, we will temporarily waive the prohibition on assignment or transfer of unconstructed authorizations on the lower 80 and General Category channels. Thus, licensees on these channels may apply to transfer or assign their authorizations regardless of construction.<sup>6/</sup> This waiver will remain in effect until six months after the conclusion of the upper band EA auction [June 8, 1998]. We believe this period will provide sufficient time for licensees to identify suitable lower band spectrum for transfer as part of voluntary relocation agreements, and for potential bidders in the lower band auction to negotiate transfers as part of their pre-auction strategy.<sup>7/</sup>

Consequently, the Second Report and Order provides the precise relief sought by the Receiver in his discussions with the FCC's staff.

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<sup>5/</sup> Second Report and Order, at paras. 39 and 40.

<sup>6/</sup> Where unconstructed spectrum is transferred, the assignee or transferee will be subject to the same construction deadline as the transferor/assignor. We will, however, allow licensees with extended implementation authority to apply their system-wide construction deadlines to licenses acquired by transfer that are within their pre-existing footprint. [footnote in the original]

<sup>7/</sup> Second Report and Order, at para. 42.

### **III. The Request Must be Granted to Afford the Affected Licensees the Relief Provided in the Second Report and Order**

The relief sought in this Request is required so that the Affected Licensees have the opportunity to realize the benefits and protections intended to be provided to them by the Commission in the Second Report and Order. While the provisions of the Second Report and Order with respect to the assignment and transfer of licenses for unconstructed stations are necessarily broadly worded, they have a direct and disproportionate impact on the Affected Licensees. The Commission froze the acceptance of applications for new SMR stations as of August 9, 1994.<sup>8/</sup> On October 31, 1995, the Commission issued a listing of SMR licenses granted as a result of its "batch processing" of backlogged applications.<sup>9/</sup> The intent of that effort was to dispose of all pending applications for new SMR systems. The licenses granted on October 31, 1995 were required to be constructed by October 31, 1996 pursuant to the provisions of Section 90.167 of the Commission's rules. Accordingly, by the time that the FCC adopted the Second Report and Order in June, 1997, few 800 MHz SMR licensees of lower 80 and General Category Channels, besides the Affected Licensees, remained legitimately unconstructed.

As a result, the Affected Licensees were almost the exclusive beneficiaries of the provisions of the Second Report and Order regarding the assignment or transfer of licenses of unconstructed stations. The Affected Licensees should not now lose the benefits of that Order simply because the FCC has not yet taken the actions necessary for the MO&O to become effective. Instead, the Commission first should take the actions specified in the MO&O, and the

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<sup>8/</sup> CMRS Third Report and Order, 9 FCC Rcd 7988, ¶ 108 (1994).

<sup>9/</sup> See Public Notice, Mimeo No. 60472, released October 31, 1995.

relief afforded by the Second Report and Order should be extended pending proper completion of those actions.

The temporary time period for Affected Licensees to assign or transfer licenses for unconstructed facilities will have no meaning or effect with respect to the Affected Licensees if the Second Report and Order's provision expires before the MO&O ever becomes effective. The Affected Licensees' ability to assign unconstructed stations is dependent on the publication of the MO&O for two reasons. First, the FCC has asserted that the licenses issued to the Affected Licensees are not valid (unless they were constructed within eight months of their initial license grant) until such time as the MO&O is published.<sup>10/</sup> The Receiver does not agree with the FCC's interpretation of the MO&O. However, assuming *arguendo* that this interpretation is valid, the Affected Licensees have had no ability to assign their authorizations to date, and cannot have taken advantage of the waiver provisions of the Second Report and Order. Second, even if, as the Receiver believes, the Commission's interpretation is incorrect, the Commission's failure to take the curative actions required by MO&O makes it less likely that the Affected Licensees will be able to affect a sale or transfer of their authorizations. The provisions of the Second Report and Order must therefore be extended until the FCC takes those curative actions, so that the Affected Licensees can take advantage of the provisions so plainly intended for their benefit. There is no valid reason for the Affected Licensees to be denied the relief granted by the Second Report and Order, particularly because the barrier to this relief is exclusively the result of the Commission failing to timely grant the relief specified, and otherwise publish the MO&O.

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<sup>10/</sup> See Letter to Bob Shirley from Terry L. Fishel, Deputy Chief, Licensing & Technical Analysis Branch, Commercial Wireless Division, dated January 15, 1998. FCC File No. 7110-02.

The relief sought in this Request will permit the Affected Licensees to assign or transfer the licenses covering their facilities in accordance with the MO&O, and the Second Report and Order, and is not intended to grant any further expansion of the relief already granted but not yet effective. Indeed, the relief requested herein, when granted, will avoid the inequity of the Commission granting relief to the Affected Licensees only to have the inaction by the staff of the FCC negate that relief and render it meaningless.

The Receiver recognizes that the FCC may grant requests only in extraordinary circumstances. As the FCC recognized in the MO&O, the circumstances giving rise to this request are unique: the Affected Licensees were fraudulently induced to apply for the authorizations without complete comprehension of their actual responsibilities mandated by the FCC. The Commission recognized these circumstances when it granted an extension of the construction period for the Affected Licensees in the MO&O. The relief the Receiver now seeks is designed simply to remedy an anomaly that will result from the expiration of the temporary waiver of the rules which prohibit assignment or transfer of licenses of unconstructed stations before the MO&O ever becomes effective. This unintended result only may be cured by extending the application of the provisions of the Second Report and Order to the Affected Licensees.

#### **IV. Standing**

The Receiver has standing to file this Request on behalf of the Affected Licensees, based upon the Commission's decision in the MO&O. Specifically, in the MO&O, the Commission ruled that the Receiver has standing on behalf of the Affected Licensees for, among other



reasons, administrative convenience.<sup>11/</sup> As in the March 1994 waiver request, the instant Request is made on behalf of multiple licensees who are similarly situated. The Commission's consideration of this Request on behalf of all of the Affected Licensees would preserve administrative resources by avoiding the repetitious evaluation of common facts that would be necessary if each Affected Licensee were required to file a separate request. Finally, as noted in the MO&O, no Affected Licensee has objected to or ever would object to the Receiver's filing of this Request on behalf of all of the Affected Licensees.

## **V. Conclusion**

The Commission should immediately grant this Request, and extend the temporary construction and assignment provisions of the Second Report and Order. The relief requested herein is necessary to ensure that the relief specifically granted for the benefit of the Affected Licensees by the Second Report and Order and the MO&O is not rendered meaningless. Such relief will have no negative effects on other parties or the public. Indeed, the circumstances that give rise to this request are unique and are unlikely to be encountered by the FCC again. For all the foregoing reasons, the Receiver urges the FCC to immediately grant the limited relief requested herein.

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<sup>11/</sup> MO&O at Section 10.

**WHEREFORE, THE PREMISES CONSIDERED**, Daniel R. Goodman, as Receiver for the Receivership Companies requests on behalf of the Affected Licensees that, in accordance with the MO&O, the Commission: (1) grant this Request and extend the provisions of the Second Report and Order which permit the assignment and transfer of licenses for unconstructed stations to the end of the period provided by the MO&O, for each Affected Licensee to construct and load their facilities and; (2) grant such other relief consistent with the relief sought herein.

Respectfully submitted,

**DANIEL R. GOODMAN, RECEIVER**

By: 

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Dated: May 11, 1998